Editor's Note: Overruled to the extent of any conflict with Heirs of George Brown, 143 IBLA 221 (1988).

ELLEN FRANK

IBLA 89-594 Decided December 2, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rescinding reinstatement of Native allotment application and closing case. Fairbanks 0848.

Reversed and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   A Native allotment application deemed pending before the Department on Dec. 18, 1971, because it was rejected in 1927 without affording the applicant's heirs an opportunity for a hearing on a disputed question of fact underlying the rejection was not legislatively approved by sec. 905(a) of ANILCA but instead must be adjudicated pursuant to the Act of May 17, 1906, as amended, because the land was validly selected by the State before Dec. 18, 1971, and was not withdrawn pursuant to sec. 11(a)(1)(A) of ANCSA.

APPEARANCES: Judith K. Bush, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant; Bonnie E. Harris, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska; Bruce E. Schultheis, Esq., James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Ellen Frank, the daughter and sole surviving heir of John Reese, has appealed from a June 26, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), rescinding BLM's February 21, 1986, reinstatement of her father's Native allotment application, Fairbanks 0848, and closing the case on that application.

It is undisputed that, during the latter part of the 1800's, Reese used and occupied land at the junction of the Tolovana and Tanana Rivers in central Alaska. On December 5, 1917, he filed Native allotment application Fairbanks 0848 seeking, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), approximately 160 acres of land

posted on the ground and described by metes and bounds in unsurveyed secs. 6 and 7, T. 1 S., R. 11 W., and secs. 1 and 12, T. 1 S., R. 12 W., Fairbanks Meridian, Alaska.

Reese's application was approved by the First Assistant Secretary on September 18, 1920, and a survey of the land was ordered on March 10, 1922. Before the survey could be conducted, H. K. Carlisle, a General Land Office (GLO) inspector, learned during a September 1925 field investigation that Reese had died (Letter to Commissioner, GLO, dated Mar. 30, 1926, at 2). Carlisle also learned that, following Reese's death, his widow left the land and moved to the village of Minto, Alaska, 60 miles away, and that
his improvements, consisting of an 18- by 20-foot cabin and cache, were destroyed by a forest fire. Carlisle concluded his report, stating:
"I was unable to find the applicant's wife but was informed by natives living near the land that she has not lived there since her husband's
death and it is their opinion that she would never make her home on
this land." He recommended that Reese's application be rejected.

In a June 24, 1926, letter to the Secretary of the Interior, the
Assistant Commissioner, GLO, recommended revocation of the September
1920 approval of Reese's application because it was "[GLO's] opinion
that [Reese's widow] would not want [the land]." The First Assistant Secretary revoked the approval on July 8, 1926. By letter dated
July 15, 1926, the Commissioner held the application for rejection,
but required the Register in Fairbanks, Alaska, to allow the "applicant" 90 days from receipt of notice to show cause why the application should not be rejected or to appeal from the notice. The letter concluded: "If no action is taken within the time allowed, the allotment application will be finally rejected."

The notice, dated March 7, 1927, was prepared by the Register and sent to Reese's last address of record in Tolovana, Alaska, along with a copy
of the Commissioner's July 1926 letter. The letter was apparently not held at the post office for 90 days as required by the Commissioner. Therefore, another similar notice dated June 3, 1927, was sent, addressed to Reese in Hot Springs, Alaska, which was apparently the location of the post office that had attempted delivery. This letter was held at the post office for 90 days. Such service was deemed by the Department to constitute "notice" to Reese's unknown heirs. Circular No. 436, 44 L.D. 364, 365 (1915). In the absence of a reply, the Commissioner rejected Reese's allotment application by decision dated November 26, 1927. There is no evidence of an appeal from that decision.

BLM reinstated Reese's allotment application on February 21, 1986. Shortly thereafter, during an August 7, 1986, field examination, Don
Emery, a BLM natural resources specialist, confirmed that Reese had
used and occupied the land as required by the Act of May 17, 1906, and recommended that the application be approved. See Field Report, dated
Aug. 25, 1986, at 6. Emery found the burned-out remains of the cabin sitting in a depression, along with a stove, cans, and washtubs. He also found evidence of trails and firewood cutting. Finally, he reported that the area contained the resources necessary to support Reese's claimed uses.

By memorandum dated January 6, 1989, BLM sought the concurrence of the Regional Solicitor, Alaska Region, in the conclusion that Reese's allotment application was "valid." The Regional Solicitor, however, replied that the application had been finally rejected by the Commissioner in November 1927 and concluded that the case should not be reopened.

Thereafter, in the June 1989 decision, BLM held that reinstatement of Reese's allotment application had been made in error because no appeal was taken from the Commissioner's November 1927 decision rejecting the application and that the doctrine of administrative finality barred any further consideration of the matter. BLM therefore rescinded the reinstatement and again closed the case. Frank appealed.

She contends on appeal that BLM's rescission of the reinstatement of the allotment application should be reversed and the allotment (not merely the application) reinstated as "approved" (Statement of Reasons at 7). She argues that the Commissioner's November 1927 rejection of the application was void either because equitable title had already vested in the applicant by virtue of the First Assistant Secretary's September 1920 approval of the application or because the applicant and his heirs were not afforded procedural due process. She also argues that it is incorrect to now view the Commissioner's November 1927 rejection as administratively final in the face of compelling legal and equitable considerations to the contrary. Finally, Frank asserts that the application was subject to either legislative approval or adjudication pursuant to section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1988).

[1] We need not resolve the question whether the Commissioner's November 1927 rejection was void, since there is an important exception to the doctrine of administrative finality in the case of Native allotment applications that were rejected prior to December 18, 1971, without an opportunity for a hearing on a disputed question of fact which constituted the basis for the rejection. Even assuming the November 1927 decision was properly served and would ordinarily be final in the absence of a timely appeal, Reese's application is considered to have been pending before the Department on December 18, 1971, for purposes of section 905(a) of ANILCA. It is considered to have been so by virtue of the fact that it was rejected without first affording, as required by Pence v. Kleppe, 529 F.2d 135, 142-43 (9th Cir. 1976), the applicant's heirs an opportunity for a hearing on a disputed question of fact that underlay the rejection, that is, whether Reese's widow wanted the land originally sought by him. Heirs of George Titus, 124 IBLA 1, 4 (1992), and cases cited therein. Reese's application was therefore subject to the provisions of section 905(a) of ANILCA.

Under that statute, allotment applications pending before the Department on or before December 18, 1971, that described land that was unreserved on December 13, 1968, were legislatively approved on the 180th day following December 2, 1980, subject to certain exceptions. One of these exceptions is where the land was, on or before December 18, 1971, validly selected by the State of Alaska pursuant to the Act of

July 7, 1958 (Alaska Statehood Act), 72 Stat. 339 (1958), as amended, and was not withdrawn pursuant to section 11(a)(1)(A) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(a)(1)(A) (1988). 43 U.S.C. § 1634(a)(4) (1988). In those cases, the application is not legislatively approved but must be adjudicated pursuant to the Act of May 17, 1906.

In this case, the land was validly selected by the State before December 18, 1971. Selection applications F-026842 and F-026844 were filed on September 30, 1960, and the land was not withdrawn pursuant to section 11(a)(1)(A) of ANCSA. Consequently, Reese's application was not legislatively approved by section 905(a) of ANILCA but instead must be adjudicated pursuant to the Act of May 17, 1906. Heirs of George Titus, supra at 5. That adjudication has yet to occur.

The record supports a conclusion that Reese completed the requisite use and occupancy under the Act of May 17, 1906, before his death, and was therefore entitled to a Native allotment. Nonetheless, under section 905(a) of ANILCA, his allotment application must be adjudicated pursuant to the Act of May 17, 1906. Accordingly, we will reverse the June 1989 BLM decision rescinding reinstatement of the application and remand the case to BLM for that purpose. Heirs of George Titus, supra at 6. Should BLM decide to approve the application, it will first allow the State an opportunity to either initiate a private contest or appeal to the Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to BLM for further action consistent herewith.

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Franklin D. Arness
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge